

**IN THE
MISSOURI SUPREME COURT**

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. SC 84695
)	
NICKLOUS CHURCHILL,)	
)	
Appellant.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION II
THE HONORABLE FRANK CONLEY, JUDGE**

APPELLANT’S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Nicklous Churchill appeals his conviction following a jury trial in the Circuit Court of Boone County, Missouri, for first degree statutory sodomy, § 566.062.¹ The Honorable Frank Conley sentenced Mr. Churchill to twenty years imprisonment. After the Missouri Court of Appeals, Western District, issued its opinion in WD59950, this Court granted Nicklous' application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

¹ All statutory citations are to RSMo 1994, unless otherwise stated.

STATEMENT OF FACTS

In early 2000, Jeanne Tolch lived in Columbia with her daughter Alexis (Tr. 197-98).² Jeanne met Nicklous Churchill in mid February, 2000 (Tr. 200). They dated for three or four weeks before Nicklous moved into Jeanne's home, sometime after Alexis' fifth birthday on March 9 (Tr. 198, 201). Nicklous lived out of a duffel bag for the time he was there; he left sometime between March 22nd and 29th (Tr. 201). Nicklous stayed with Jeanne only about ten days, during which they slept in the same bed (Tr. 221-22).

Nicklous was never alone with Alexis during the day and did not baby-sit for her (Tr. 202). A couple of days after he "moved in" Nicklous lost his job (Tr. 202). About that same time he came back from Marshall "with hickeys up and down his neck and his arms and his body." (Tr. 203). He told Jeanne that he was wrestling with his friend; Jeanne guessed that they bit each other (Tr. 203). Jeanne did not believe him; she was upset and they had an argument, but Nicklous wanted to continue things, so Jeanne "let it rest." (Tr. 203, 218).

Two or three days later, Nicklous was gone again for about two days (Tr. 203). He again said he had been in Marshall -- in jail this time -- and Jeanne testified that she "pretty much just let it [the relationship] go." (Tr. 203, 220). Nicklous stayed a bit longer, then Jeanne told him to get his things and move out (Tr. 203-04). Jeanne

² The Record on Appeal consists of a transcript (Tr.) and a legal file (L.F.).

said Nicklous was not ready to give up the relationship and continued to call her, but she just told him it was over; they had no real conversations (Tr. 205).

Jeanne admitted on cross-examination that during Nicklous' second "disappearance," Nicklous' friend called and told her that Nicklous was in jail and needed money (Tr. 220). Jeanne did not believe Nicklous was in jail and called Marshall to confirm this (Tr. 220). This was the last straw for Jeanne (Tr. 220). It was upsetting, but it was not devastating, because they had been together only a month or so (Tr. 220-21).

Jeanne said that after one of the harassing calls from Nicklous, she was playing a game with Alexis, who asked if Nicklous was coming back; Jeanne told her no (Tr. 206). She said that Alexis told her "Mommy, I'm glad because Nicklous touched me in my crotch. He hurt me, mom." (Tr. 207). Jeanne said that Alexis told her that Nicklous "locked her in the bathroom. . . . And had touched her, tooken [sic] her panties off. And had inserted his fingers into her crotch." (Tr. 207).

According to Alexis, Jeanne was asleep, and Nicklous would not let Alexis wake her up because Jeanne would be mad (Tr. 207). Jeanne said that "crotch" and "gina" were words Alexis used to describe her vagina (Tr. 207). Alexis told Jeanne that this had happened five or six times -- she mentioned it being in the bathroom, bedroom, and later she brought up that "[t]here was possibly an incident in the kitchen" (Tr. 207-08, 224).

Alexis told Jeanne that it "hurt really bad. He had hurt her. He had dropped her also on the floor. I guess he was physically abusive to her on top of the

molestation.” (Tr. 208). Jeanne said Nicklous dropped Alexis on the bathroom floor before he molested her (Tr. 208). Alexis never told Jeanne that any “touch” occurred other than when Jeanne was sleeping, nor that anyone but Nicklous touched her, nor that it happened anywhere other than Jeanne’s home (Tr. 208-09). Alexis related that the first time, Nicklous picked her up from her bed, carried her to the bathroom and dropped her on the floor (Tr. 225-26). She also said Nicklous was mean to her -- he pinched her and dropped her (Tr. 226). Jeanne did not recall telling the police that Nicklous dropped Alexis on the floor (Tr. 226).

Jeanne confronted Nicklous with Alexis’ allegations on about March 29 (Tr. 212). Jeanne responded to Nicklous’ page and told him that she knew he molested Alexis (Tr. 213). Nicklous said, “what are you talking about? What are you talking about?” and Jeanne hung up (Tr. 213). Jeanne said from that point she constantly got harassing calls from Nicklous, in which he threatened to kill her and her family, and asked “how can [she] accuse him of this because [her] daughter had been fucking.” (Tr. 213). This continued over a three day period, then Nicklous would call and not speak (Tr. 213). After her rage cooled, Jeanne took Alexis to her pediatrician, who referred her to DFS for a SAFE examination (Tr. 215-16).

Boone County Sheriff’s detective Michael Stubbs interviewed Jeanne and Alexis on April 11 (Tr. 175, 179-80). A DFS worker was also present (Tr. 181). Jeanne was interviewed alone first (Tr. 183). Alexis then sat on Jeanne’s lap during her interview, but never turned to look at her mother (Tr. 181, 183).

Stubbs asked Alexis how she and Nicklous got along, and Alexis said, “Not very well.” (Tr. 185). She was asked to explain why and said, “Because he touched my crotch.” (Tr. 185). Alexis said this happened in the bathroom at her house (Tr. 186). Alexis said that Nicklous “put his fingers inside my crotch.” (Tr. 187). Stubbs asked where her crotch was and Alexis pointed to her vagina (Tr. 188). Alexis added that Nicklous locked her in the bathroom, that her mother was sleeping, and that it hurt (Tr. 187). Neither she nor Nicklous said anything (Tr. 188). Alexis said this happened one time (Tr. 188).

The SAFE exam was performed on April 12 (Tr. 252-53). Dr. Hana Solomon first interviewed Alexis to assess her development and her ability to verbalize (Tr. 254). Dr. Solomon asked Alexis to tell her about Alexis’ mother’s boyfriend (Tr. 256). Alexis said that “his name was Nick, she didn’t like him. He hurt me.” (Tr. 256). Alexis went on, “He hurt me in my crotch. It hurted. He locked me in my room.” (Tr. 256). Alexis also told Dr. Solomon that, “My mommy was sleeping. I was in the bathroom. He wanted me to lay down. He said lay down.” (Tr. 257).

Dr. Solomon asked Alexis what Nicholas touched her with and Alexis said that, “He touched me with his finger under my pajamas, inside my body, a lot of times. It was an ouchy. And he didn’t care.” (Tr. 257-58). Alexis claimed that Nicklous then locked her in her room, “for six minutes, a long time” by putting a chair against the doorknob (Tr. 258).

The doctor then conducted a physical exam, which was normal (Tr. 264). There was no bruising, swollen edges, or notch of the hymen, no lacerations, and no

damage to the perineum (Tr. 271). Dr. Solomon would expect that any signs of such injuries would be gone within 72 hours (Tr. 272-73). There were no scars or indications of healing injuries and the doctor would not expect any from a “digital penetration injury.” (Tr. 274). Nicklous is about six feet five inches tall and has large hands and fingers (Tr. 310, 351).

Alexis’ behavior changed after she disclosed this to her mother (Tr. 210). She began wetting herself both during the day and after nightmares (Tr. 210). This died down after about six months (Tr. 210). Jeanne got Alexis into counseling and “she started getting comfortable, then the trial came up and she began acting out and wetting herself again for two or three days; then “she got comfortable with it again.” (Tr. 210). Jeanne once caught Alexis masturbating with her Barbie doll in the bathtub; she felt that Alexis had no reason to know anything about masturbating (Tr. 210).

During a hearing held under § 491.075 to determine the admissibility of Alexis’ statements, Dr Solomon said that Alexis was “very believable” (Tr. 44). At the end of that hearing, the court advised the prosecutor, “I do not want that witness when we try this lawsuit to make any comment about believability or lack thereof.” (Tr. 51). At trial, Dr. Solomon testified that she received training in medical school “in the area of child sexual abuse” (Tr. 251). This was not a major portion, but was one “segment in becoming educated about all aspects of child health care.” (Tr. 251). She has been a certified SAFE examiner since 1990, and has conducted between 100 and 200 SAFE exams in that time (Tr. 251-52).

The prosecutor asked Dr. Solomon whether Jeanne reported any behavioral changes in Alexis (Tr. 260). The doctor said that Jeanne told her that Alexis wet the bed and developed nightmares “for a few days following this incident” (Tr. 260). When the prosecutor asked the significance of the behavioral changes, Nicklous objected that the witness was going to give an opinion about whether sexual abuse had occurred, that the court had admonished the witness at the prior hearing not to give such an opinion, and that there was no foundation shown for the witness to testify as to the significance of behavioral changes (Tr. 260-61). The court overruled Nicklous’ objection and the doctor said that the behavioral changes meant that “a significant event had occurred in the girl’s life.” (Tr. 261).

In formulating a conclusion, the doctor considers a child’s history, initial demeanor, changes in affect, and ability to give “details that were beyond the scope of her developmental and chronological age.” (Tr. 264). According to Dr. Solomon, Alexis “had knowledge that was not normal or expected for such a child.” (Tr. 264). The doctor went on to discuss the significance of Alexis’ demeanor:

It was very concerning that initially she was outgoing, comfortable, verbal. And then when she started discussing the details of the event she was telling me about, her entire affect changed, became soft-spoken as I mentioned. And that told me a significant, that this event she was telling me was real and that a significant event had occurred to her.

(Tr. 265). Nicklous objected (Tr. 265). He said that the doctor was giving her

opinion that this was real and was “totally intruding upon the province of the jury. The court had admonished the State not to elicit such a response. I’m moving for a mistrial.” (Tr. 265). The court said, “The objection will be overruled.” (Tr. 265).

The doctor then said that the physical exam was normal, though it is “[v]ery, very, very, very common” for the physical exam to be normal in cases where sexual abuse is alleged; “80 to 90 percent” are normal (Tr. 265-66). She also said that the vaginal area was a “very vascular” area that heals “very, very quickly.” (Tr. 266). The prosecutor asked what she indicated in her report, “taking into account the entire evaluation” (Tr. 266). Nicklous’ objection that that this called for an opinion was overruled and the Dr. Solomon said “[t]he entire examination was consistent with sexual abuse.” (Tr. 266-67). The history given by Alexis was the major consideration (Tr. 271). The doctor agreed that her testimony was basically “a rehash of what someone else told [her]” (Tr. 271-72).

According to Jeanne, Alexis said in counseling that Nicklous was mean and aggressive when he touched her (Tr. 227). Jeanne denied that Alexis said that he was always mean and aggressive with her (Tr. 227). She admitted that Alexis said that Nicklous would lock her in her bedroom by putting a chair against the door (Tr. 227-28). Jeanne did not notice any bruising on Alexis from being dropped (Tr. 228). She said Nicklous was “overly nice” or “overly friendly” when she saw him interacting with Alexis, though she did not think of it this way at the time; she thought Nicklous was “just trying to be a good dad.” (Tr. 229-30).

Jeanne claimed that Alexis told her from the very beginning “most” of what Jeanne testified to (Tr. 230). In a deposition Jeanne said that Alexis had just recently gone into a lot of detail (Tr. 231). She explained that this meant that the “new” information Alexis had given her was just how aggressive Nicklous had been (Tr. 232). She then said that the “new” information included the allegation that Nicklous dropped Alexis on the floor (Tr. 233). Jeanne might not have mentioned in the deposition that Alexis claimed that Nicklous pinched her (Tr. 233). She did say that Alexis told her that Nicklous inserted two fingers into her vagina (Tr. 232, 234). Jeanne did not recall Alexis telling the police that the touching had happened only one time (Tr. 240).

Alexis testified that when Nicklous lived with them, he touched Alexis’ “private part” with his fingers (Tr. 172-73). She said that she called this area her “crotch;” she had no other names for it (Tr. 172). She said this hurt and that it happened more than once, but she did not know how many times (Tr. 173). It happened in the bathroom of her house (Tr. 173). Alexis told her mother but did not remember talking to anyone else (Tr. 174).

Nicklous denied that he sexually or physically abused Alexis in any way (Tr. 310). Early in their relationship he did not know that Jeanne had a daughter (Tr. 285-86). Things progressed quickly; Nicklous was seeing Jeanne every day (Tr. 286). He was also dating others but did not tell Jeanne about them (Tr. 287). They became intimate within a week or week and a half, and that was when Nicklous learned about

Alexis (Tr. 287, 315). Nicklous moved in right after that, but was not interested in a relationship involving a ready made family (Tr. 287, 290).

Nicklous figured that the relationship would not work (Tr. 292). He did not show up for one whole weekend when he went to see another woman in Marshall (Tr. 292). He made excuses, including that he was in jail, but Jeanne got mad and called him “[e]very name but Nick.” (Tr. 294). Jeanne remained mad and eventually told Nicklous that she knew he was running around with other women (Tr. 301). She finally told Nicklous over the phone that it was over and that he should not come around her or her daughter (Tr. 303). Nicklous denied that he called Jeanne or harassed her (Tr. 303).

Nicklous moved to Marshall on March 29 to be with a girlfriend, and learned of Alexis’ allegations when he returned to Columbia on June 2 (Tr. 305). He went to turn himself in when he heard from his brother and father that the police were looking for him (Tr. 305, 307-08). Nicklous wanted to tell the police his side of the story but they never asked him; he did not try to contact anyone to tell his story after he was arrested (Tr. 309, 333). He waited for detective Stubbs to talk to him because he did not know who else to contact (Tr. 334).

During the State’s closing argument the prosecutor told the jury, “Alexis Tolch came in here and she was honest. She’s been honest since day one. Children don’t make this up. This is not within their life experience.” (Tr. 359).

The jury found Nicklous guilty of first degree statutory sodomy, but not guilty of victim tampering -- allegedly threatening to kill Jeanne to dissuade her from

reporting the alleged sodomy (L.F. 30, 33, 34). On April 23, 2001, the court sentenced Nicklous to twenty years imprisonment (L.F. 40). Notice of appeal was filed May 1, 2001 (L.F. 43). After the Western District of the Court of Appeals affirmed in No. WD 59950, this Court granted Nicklous' application to transfer the appeal to this Court.

POINTS RELIED ON

I.

The trial court erred and abused its discretion in overruling Nicklous’ objection and request for a mistrial when Dr. Solomon testified to her opinion that what Alexis alleged “was real” because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that Dr. Solomon’s testimony that the event that Alexis described “was real” constituted an impermissible opinion of another witness’ credibility, thereby usurping the function of the jury. Allowing this inadmissible testimony made the jury more likely to convict Nicklous because the witness improperly bolstered Alexis’ credibility.

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988);

State v. Taylor, 663 S.W.2d 235 (Mo. banc 1984);

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995);

State v. Williams, 858 S.W.2d 796 (Mo. App., E.D. 1993);

U.S. Const., Amends VI and XIV; and

Mo. Const., Art. I, Secs. 10 and 18(a).

II.

The trial court erred and abused its discretion in overruling Nicklous' objection to Dr. Solomon's testimony that the changes in Alexis' behavior were "consistent" with sexual abuse and were indicative of a significant event in her life, because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that her testimony was without any foundation because there was no showing that Dr. Solomon had any mental health expertise that would render her competent to express an opinion on the meaning of behavioral changes in alleged child victims of sexual abuse. Allowing the testimony made the jury more likely to convict Nicklous because it improperly bolstered Alexis' credibility.

State v. Silvey, 894 S.W.2d 662 (Mo. banc 1995);

State v. Williams, 858 S.W.2d 796 (Mo. App., E.D. 1993);

In the Matter of Johnson v. State, 58 S.W.3d 496 (Mo. banc 2001);

State v. Love, 963 S.W.2d 236 (Mo. App., W.D. 1997);

U.S. Const., Amends VI and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

§§ 337.015 and 337.600.

ARGUMENT

I.

The trial court erred and abused its discretion in overruling Nicklous' objection and request for a mistrial when Dr. Solomon testified to her opinion that what Alexis alleged "was real" because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, because Dr. Solomon's testimony that the event that Alexis described "was real" constituted an impermissible opinion of another witness' credibility, thereby usurping the function of the jury. Allowing this inadmissible testimony made the jury more likely to convict Nicklous because the witness improperly bolstered Alexis' credibility.

For the jury to believe Alexis' story and convict Nicklous, they had to believe that she was mistaken or simply exaggerated when she told her mother that Nicklous molested her five or six times -- in the bathroom, the bedroom, and later adding the kitchen (Tr. 207-08, 224) -- but told the examining doctor and the investigating officer that it was one time only, in the bathroom. (Tr. 186, 188, 256-57). They had to believe that Nicklous -- who was never alone with Alexis while Jeanne was awake -- could arise from the bed he shared with Jeanne, wake Alexis, take her from her bedroom to the bathroom, drop her on the floor there, then sodomize her, which

“hurt” her -- all without waking this five-year-old’s mother (Tr. 202, 207-08, 222). And they had to believe that dropping Alexis on the bathroom floor would not leave any bruises that either her mother or Dr. Solomon could see (Tr. 228, 264).

The jury also had to believe that Nicklous had the desire to seek out a child for sexual gratification. They had to believe that a large man like Nicklous, with large fingers (Tr. 310, 351), would leave no sign when he penetrated Alexis’ vagina with those fingers. And they had to believe that Nicklous could lock Alexis *in* her bedroom by putting a chair under the doorknob (Tr. 258).

Of course this last simply is impossible; one can only “lock” a door this way from the *inside* (there was no evidence that the door opened outward, which would be highly unusual for a bedroom door). So this -- and all the other inconsistencies in Alexis’ stories, the complete lack of physical evidence to support it, and the reasonable doubt that anyone could accomplish what Alexis claimed without making her cry or otherwise making enough noise to wake Jeanne -- all this meant that the State needed a reason to give the jury so it would believe Alexis. Believe her despite the considerable evidence that suggested that she either made it up or had been led to believe that this really happened. Jeanne certainly had a motive to lead Alexis into this story -- she had let Nicklous move in with her only to have him immediately cheating on her at least twice (Tr. 203).

During the § 491.075 hearing on the admission of Alexis’ statements, Dr. Hana Solomon, the SAFE examiner, said that Alexis was “very believable” (Tr. 44). At the end of that hearing, the court advised the prosecutor, “I do not want that witness when

we try this lawsuit to make any comment about believability or lack thereof.” (Tr. 51).

Then at trial, the prosecutor asked Dr. Solomon whether Jeanne reported any behavioral changes in Alexis (Tr. 260). When the prosecutor asked the significance of the behavioral changes, Nicklous objected that the witness was going to give an opinion about whether sexual abuse had occurred, that the court had admonished the witness at the prior hearing not to give such an opinion (Tr. 260-61).³

The court overruled Nicklous’ objection and Dr. Solomon said that the behavioral changes meant that “a significant event had occurred in the girl’s life.” (Tr. 261). The doctor went on to discuss the significance of Alexis’ demeanor:

It was very concerning that initially she was outgoing, comfortable, verbal. And then when she started discussing the details of the event she was telling me about, her entire affect changed, became soft-spoken as I mentioned. And that told me a significant, that this event she was telling me was real and that a significant event had occurred to her.

(Tr. 265). Nicklous immediately objected, then stated at the bench, “Judge, now she’s given an opinion to say in her opinion this is real. She’s totally intruding upon the province of the jury. The court had admonished the State not to elicit such a response. I’m moving for a mistrial.” (Tr. 265). The court said, “The objection will be overruled.” (Tr. 265).

³ Nicklous also objected that there was no foundation for such an opinion (Tr. 261); *see* Point II, *infra*.

This Court has often noted that trial courts have broad discretion in determining the admissibility of evidence. *State v. Guinan*, 665 S.W.2d 325 (Mo. banc), *cert. denied* 469 U.S. 873 (1984). They do not, however, have unfettered discretion. *State v. Williams*, 673 S.W.2d 32, 35 (Mo. banc 1985). “Witnesses should not give their opinions upon the truth of a statement by another witness. . . .” *State v. Savory*, 893 S.W.2d 408, 410 (Mo. App., E.D. 1995), *quoting Holliman v. Cebanne*, 43 Mo. 568, 570 (1869).

Indeed, this Court has held that even expert testimony is inadmissible if it relates to the credibility of witnesses because this constitutes an invasion of the province of the jury. *State v. Lawhorn*, 762 S.W.2d 820, 823 (Mo. banc 1988); *State v. Taylor*, 663 S.W.2d 235 (Mo. banc 1984). In *Taylor*, this Court disapproved the State’s use of a psychiatrist’s opinion that the alleged victim suffered from rape trauma syndrome as a result of the rape incident she described; this went “beyond proper limits of opinion expression.” 663 S.W.2d at 239-40. The Court noted that the jury was competent to assess the witnesses’ testimony, and allowing a doctor to express his opinion of the alleged victim’s veracity “designed to invest scientific cachet on the critical issue was erroneously admitted.” *Id.* at 241.

Further, in *State v. Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995), this Court approved the analysis from *State v. Williams*, 858 S.W.2d 796 (Mo. App., E.D. 1993), in which the Court of Appeals held that the trial court had committed plain error in failing to declare a mistrial after an expert witness in a child sex abuse case improperly commented on the alleged victim’s credibility. The expert testified:

There are only two people who know whether a child has been sexually abused, the child and the person who abused them, and very rarely do children lie about it, especially 8-year olds or 7-year olds. . . . Incidents of lying among children is very low, less than three percent.

858 S.W.2d at 800.

This Court also noted that the *Williams* court made clear that there are generally two types of expert testimony challenged in child sexual abuse cases:

1) general testimony describing behaviors and other characteristics commonly observed in sexually abused victims (often called general “profile” testimony); and 2) particularized testimony concerning the alleged victim’s credibility. While the trial court has great discretion in admitting the former, the latter usurps the province of the trier of fact and is inadmissible.

Silvey, 894 S.W.2d at 671; *quoting Williams*, 858 S.W.2d at 798-99. Dr. Solomon’s testimony was of the latter variety, and the court erred in overruling Nicklous’ objection.

Not only did Nicklous seek to prevent the State from getting into this subject (Tr. 261), but he also requested that the court declare a mistrial after the doctor said that what Alexis told her “was real” (Tr. 265). Declaration of a mistrial is within the sound discretion of the trial court, and should be granted only where the prejudice cannot be removed any other way. *State v. Johnson*, 901 S.W.2d 60, 62 (Mo. banc

1995). Here, this evidence was very harmful to Nicklous' case, because the jury's decision came down to appraising the relative credibility of Nicklous and Alexis. There was no medical or physical evidence to support Alexis' claims, and the inconsistencies in Alexis' claims, noted above, make it likely that, in a fair test of credibility, the jury would have acquitted Nicklous. Indeed, where the jury had to choose between the credibility of Nicklous vs. Jeanne as to the charge of victim tampering, it chose Nicklous (L.F. 30,34). But once the doctor said Alexis' story "was real" there was no cure or way to erase this from the minds of the jurors.

Even though the court erred in permitting the State to get into this subject, it still could have prevented this unfair conviction by declaring the mistrial that Nicklous requested, rather than allow the jury to reach a decision on this tainted, unfair evidence. And this is especially true where first the court reinforced the jury's use of this evidence by overruling Nicklous' objection (Tr. 265), then the prosecutor doubly reinforced it by telling the jury in closing argument:

- "I told you on voir dire that this was going to be a case involving the credibility of witnesses." (Tr. 341).
- "What you have to decide is who is telling the truth. Alexis Tolch versus this defendant." (Tr. 343).
- "One of the things that you can consider, ladies and gentlemen, in determining the believability of Alexis Tolch is what she told her mother, what she told detective Stubbs, and what she told Dr. Solomon." (Tr. 343).

- “And there’s no reason to believe that what [Alexis] told you today is anything but the truth.” (Tr. 345).
- “Credibility of witnesses. You have no evidence before you that Alexis Tolch has done anything but tell you the truth.” (Tr. 346).
- “It’s ludicrous to think she’s making this up. This is not something that’s within the normal realm of a five-year-old.” (Tr. 347).

The final references came in the closing portion of argument, when Nicklous could no longer respond:

- “Alexis Tolch came in here and she was honest. She’s been honest since day one. Children don’t make this up.” (Tr. 359).
- “There is no reason to believe that Alexis would make this up.” (Tr. 361).

This was not a fair test of credibility, nor a fair trial, because the State was allowed to put a medical doctor on the stand to tell the jury that she had eleven years experience in examining sexual abuse victims, and *she* believed Alexis. Although the prosecutor did not directly refer to Dr. Solomon’s opinion, she very much argued that Alexis’ testimony was truthful. Every one of these incidents of vouching by the prosecutor was reinforced by the doctor’s opinion that it “was real.”

In its brief in the Court of Appeals, the State admitted that it was error for the trial court to permit Dr. Solomon’s testimony that the event Alexis described “was real,” but claims that it was harmless error nonetheless. (Resp. Br. 14). This is so, it said, because the error was “slight” when compared to the error present in cases that have been reversed (Resp. Br. 14). It said this was a “slight” error because there was

not a “long series” of questions about Alexis’ credibility, as it claimed there was in both *Taylor* and *Williams*. But neither case is so limited, as the foregoing discussion of *Taylor* shows. However long the testimony about the basis of rape trauma syndrome may have been, the offending testimony was brief -- that the alleged victim suffered from the syndrome, thus bolstering her credibility that a rape had occurred. 663 S.W.2d at 240-41.

Similarly, in *Williams*, the Eastern District reversed the defendant’s conviction where the witness did not even address the *victim’s* individual credibility, but only opined that “very rarely do children lie about” sexual abuse. 858 S.W.2d at 800-801. Again, this was not a “lengthy series” of questions, but a single paragraph of the doctor’s answer to a single question. Indeed, the Court found that this vouching reached the level of manifest injustice and reversed for plain error. *Id.* at 801.

Since the jury’s verdict was the result of its impression of the witnesses’ credibility, we hold that the doctor’s opinion on the truthfulness of the victim manifestly prejudiced appellant by usurping the province of the jury. The danger was too great that the jury accepted the doctor’s testimony as conclusive of appellant’s guilt without making an independent determination of the victim’s credibility. The doctor’s statements amounted to an impressively qualified stamp of truthfulness on the victim’s story, and a miscarriage of justice will result from a refusal to reverse for plain error.”

Id., at 801. No less occurred in this case.

As did the State, the Court of Appeals recognized that Dr. Solomon's testimony "was improper vouching." Memo. at 10. But it accepted the State's position that Nicklous' "first and only objection, a request for mistrial, came *after* the opinion had been offered. No other relief was requested." *Id.* This position is absolutely wrong, as noted above. Nicklous' request for mistrial came *after* his initial objection to testimony about the "significance of behavioral changes" was overruled (Tr. 260-61). The prosecutor digressed to cover the doctor's background and the physical exam (Tr. 261-64), then asked again, "What part of the demeanor was significant?" (Tr. 264-65).

This prompted the answer, "this event . . . was real" (Tr. 265). Nicklous *first* objected, *then* moved for a mistrial (Tr. 265). The court said, "The objection will be overruled." (Tr. 265). *Clearly*, Nicklous presented *both* an objection and a motion for mistrial. It simply is not true that a mistrial was the only relief Nicklous requested. He *did* object, twice, to this line of inquiry, and the court overruled *both* objections.

Further, the thought that Nicklous should have proposed an alternate remedy fails to account for the fact that the court specifically *approved* the testimony -- testimony that both the State and Court of Appeals now concede was improper -- thus giving the jury the clear signal that it could and should consider the doctor's opinion. It also is unreasonable to believe that any trial court would give such an instruction after having overruled an objection to the testimony at issue. A curative instruction is given when the court rules the evidence *inadmissible*, not when it overrules the objection. A lesser remedy was not a viable alternative here, and in reality it does not

matter whether Nicklous' conviction is reversed because the trial court erred when it overruled the objection or because it denied Nicklous' request for a mistrial. At this point, the remedy for either error is the same: a new trial.

In the context of this case, the doctor's testimony bolstered Alexis' credibility and the prosecutor repeatedly emphasized that credibility in argument. The result was a conviction in Count I -- Alexis vs. Nicklous. But where the doctor was *not* asked to bolster *Jeanne's* credibility, the result in Count II -- Jeanne vs. Nicklous -- was an acquittal of victim tampering (L.F. 34). The unfair evidence of Dr. Solomon's opinion of Alexis' credibility was therefore, if not the determining factor, then surely at least a significant factor in Nicklous' conviction of sodomy. Overruling his objection, then not declaring a mistrial after the doctor said "it was real" -- based only on her opinion of the story Alexis told her -- violated Nicklous' rights to due process of law and a fair trial before a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

This Court must therefore reverse Nicklous' conviction and remand for a new trial without this inadmissible evidence of one witness' opinion of the credibility of another.

II.

The trial court erred and abused its discretion in overruling Nicklous' objection to Dr. Solomon's testimony that the changes in Alexis' behavior were "consistent" with sexual abuse and were indicative of a significant event in her life, because the ruling denied Nicklous his rights to due process of law and to a fair trial before a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that her testimony was without any foundation because there was no showing that Dr. Solomon had any mental health expertise that would render her competent to express an opinion on the meaning of behavioral changes in alleged child victims of sexual abuse. Allowing the testimony made the jury more likely to convict Nicklous because it improperly bolstered Alexis' credibility.

As stated above, for the jury to believe Alexis' story, they had to believe that she was mistaken when she told her mother that Nicklous molested her five or six times -- in the bathroom, the bedroom, and, later, the kitchen (Tr. 207-08, 224) -- but was correct when she told the examining doctor and the investigating officer that it was one time only, in the bathroom. (Tr. 186, 188, 256-57).

They also had to believe that Nicklous could arise from the bed he shared with Jeanne, wake Alexis, take her from her bedroom to the bathroom, drop her on the floor there without bruising her, then sodomize her, which "hurt" her -- all without

waking five-year-old Alexis' mother (Tr. 207-08, 222, 264). They had to believe that Nicklous would seek out a child for sexual gratification. They had to believe that Nicklous, with large fingers (Tr. 310, 351), would leave no sign when he penetrated Alexis' vagina with those fingers. And they had to believe that Nicklous could lock Alexis *in* her bedroom by putting a chair under the doorknob (Tr. 258). While the state of the law is such that Nicklous cannot challenge the sufficiency of the evidence, the State had serious credibility problems to overcome in its case.

A simple method to bolster Alexis' credibility was to add another voice telling the jury that Alexis told the truth. The State added Dr. Solomon's voice when she testified over Nicklous' objection about the significance of the changes in Alexis' behavior that Jeanne told her about (Tr. 260-61). Although Jeanne said Alexis' behavioral problems arose after Alexis made her allegation, the doctor said that Jeanne told her that Alexis wet the bed and developed nightmares "for a few days following this incident" (Tr. 210, 260). When the prosecutor asked the significance of the behavioral changes, Nicklous objected that there was no foundation shown for the witness to give testimony as to the significance of behavioral changes (Tr. 260-61).⁴ The court overruled his objection (Tr. 261).

⁴ Asking about the significance also made this an objectionable question because it called for a direct opinion as to Alexis' credibility (*see* Point I), rather than simply stating whether Alexis exhibited behaviors common to children that have been sexually abused. *See, State v. Silvey*, 894 S.W.2d 662, 671 (Mo. banc 1995).

The State inquired as to the “normal” physical exam (Tr. 262-64), then asked about the factors the doctor considers in reaching her “conclusion in this particular case” (Tr. 264). The doctor considers a child’s history, initial demeanor, changes in affect, and ability to give “details that were beyond the scope of her developmental and chronological age.” (Tr. 264). After testifying that the change in Alexis’ affect meant that her story “was real” (Tr. 265; *see* Point I), the prosecutor asked what the doctor indicated in her report, “taking into account the entire evaluation” (Tr. 266). Nicklous’ objection that that this called for an opinion was overruled and the Dr. Solomon said “[t]he entire examination was consistent with sexual abuse.” (Tr. 267).

In *Silvey*, this Court approved the analysis from *State v. Williams*, 858 S.W.2d 796 (Mo. App., E.D. 1993), in which the Eastern District held that the trial court had committed plain error in failing to declare a mistrial after an expert witness in a child sex abuse case improperly commented on the alleged victim’s credibility. This Court noted that the *Williams* court made clear that there are generally two types of expert testimony challenged in child sexual abuse cases:

1) general testimony describing behaviors and other characteristics commonly observed in sexually abused victims (often called general “profile” testimony); and 2) particularized testimony concerning the alleged victim’s credibility. While the trial court has great discretion in admitting the former, the latter usurps the province of the trier of fact and is inadmissible.

Silvey, 894 S.W.2d at 671; *quoting Williams*, 858 S.W.2d at 798-99. Therefore,

while testimony describing a “typical” child sexual assault victim may pass muster as falling under the first provision above, it is also true that the “test of expert qualification is whether he has knowledge from education or experience that will aid the trier of fact.” *State v. Mallett*, 732 S.W.2d 527, 537 (Mo. banc 1987), *cert. denied*, 484 U.S. 933 (1987).

To lay an adequate foundation to establish Dr. Solomon’s expertise, the State had to show that she had sufficient experience and acquaintance with the phenomena involved to testify as an expert. *State v. Bradley*, 57 S.W.3d 335, 340 (Mo. App., S.D. 2001). Dr. Solomon received training in medical school “in the area of child sexual abuse” (Tr. 251). This was not a major portion, but was one “segment in becoming educated about all aspects of child health care.” (Tr. 251). She has been a certified SAFE examiner since 1990, and has conducted between 100 and 200 SAFE exams in that time (Tr. 251-52). Nonetheless, the court overruled Nicklous’ objection to the “foundation for this witness to give testimony as to what the significance is of behavioral changes.” (Tr. 261). Dr. Solomon then testified that the behavioral changes meant that “a significant event had occurred in the girl’s life” (Tr. 261); that her story “was real” (Tr. 265); and finally that, “[t]he entire examination was consistent with sexual abuse.” (Tr. 267).

This Court noted in *In the Matter of Johnson v. State*, 58 S.W.3d 496, 499 (Mo. banc 2001), that it is generally within the trial court’s sound discretion to admit or exclude an expert’s testimony. An expert witness may be qualified on foundations

other than the expert's education or license. *Id.* But the Court went on,

Persons who are licensed medical doctors practicing psychiatry, licensed psychologists, and licensed social workers are permitted by law to evaluate persons and make diagnoses of mental disorders.

Id. Dr. Solomon did not testify that she practiced psychiatry; thus the State did not qualify her to discuss the significance of any behavioral changes in Alexis. It also did not show that her SAFE training included any education in behavior, common or otherwise. The Court also noted that:

The phrase, “the practice of medicine,” is not legislatively defined, but has been construed by the courts to include the diagnosis and treatment of the sick. [citation omitted] The “practice of psychology” is defined in section 337.015.3 and includes the “diagnosis and treatment of mental and emotional disorder or disability.” “Clinical social work” is defined in section 337.600 to include “diagnosis, treatment, prevention and amelioration of mental and emotional conditions.”

Id. In short, the State established absolutely no basis on which Dr. Solomon was competent to testify on the subject. She was qualified as a physician, nothing more. Her expertise was limited to testifying that the physical exam was “normal” (Tr. 264), but she gave “expert” testimony on far more than medical issues.

The Court of Appeals held that the trial court could reasonably have viewed Dr. Solomon's SAFE examiner certification and yearly updates as sufficient to qualify

her to testify to the significance of Alexis' alleged behavioral changes. Memorandum opinion at 5. It also said that Nicklous' objection at trial as to a lack of foundation was not specific. *Id.* The Court cited *Silvey*, *supra*, for the proposition that, "[i]t is recognized in forensic medicine that there are behaviors and characteristics commonly observed in sexually abused children." Memo. at 5-6. This is an incorrect reading of *Silvey*. What this Court said in *Silvey* was:

The only conclusion drawn by [clinical social worker] Boniello was that A.P. exhibited several behavioral indicators consistent with a child that has been sexually abused. This conclusion is clearly within the province of allowable expert testimony and did not invade the province of the jury.

894 S.W.2d at 671. Thus, *Silvey* does not stand for the proposition that a *doctor*, even a SAFE examiner, is automatically qualified to render an opinion on this subject. Further, in *Silvey*, there was *no* objection. *Id.* Thus, there was no opportunity for the trial court to rule on the expert's qualifications. Here, on the other hand, Nicklous did object on foundational grounds (Tr. 260-61).

Dr. Solomon's qualifications, according to the State's evidence, were as follows: she had been a pediatrician in private practice for eleven years (Tr. 250); she received training in medical school "in the area of child sexual abuse" that was "one more segment in becoming educated about all aspects of child health care" rather than a "major portion" of her course of instruction (Tr. 251); she has been a certified SAFE

examiner since 1990 (Tr. 251), for which she attended an initial SAFE training and a yearly update (Tr. 252); and has conducted between 100 and 200 SAFE exams (Tr. 252).

The doctor did not mention any training in psychology, psychiatry, or that any of her initial or continuing education included these subjects. Not one question was asked about her training in the area of typical behaviors of child sex victims. Not one question was asked whether she had education in the area. Not one bit of testimony disclosed whether she had *any expertise* on this subject. Not one question showed that she had “knowledge from education or experience that [would] aid the trier of fact.” *State v. Mallett, supra*.

“If a witness is not qualified, by either education or experience, as an expert in the area in which the expert proposes to testify, then the expert’s testimony will not assist the jury and therefore may be excluded, however expert the proposed witness may be in other areas.” *State v. Love*, 963 S.W.2d 236, 241 (Mo. App., W.D. 1997). Simply being a physician did not qualify Dr. Solomon as a mental health or behavioral expert. Paraphrasing this Court’s decision in *Johnson, supra*, Dr.’s Solomon’s experience as a medical doctor may qualify her to testify as an expert on many issues, but the significance of behavioral changes is not even arguably within her area of expertise. 58 S.W.3d at 499. She was essentially a lay witness on this subject, and the court erred and abused its discretion in allowing her to render an opinion based solely on the history of behavioral changes reported to her.

This evidence was very harmful to Nicklous' case, because this was purely a contest of credibility between him and Alexis. There was no medical or physical evidence to support Alexis' claims. And Alexis' behaviors had an alternate explanation. According to her mother, Alexis did not exhibit the "behaviors" -- the bedwetting and nightmares -- when the abuse allegedly *happened*, but only when she *disclosed* it to her mother (Tr. 210). Thus, her behavior could as easily have been brought on by stress due to lying to her mother as by abuse. And as for the other witnesses' testimony, it solely derives from Alexis'. There was no other evidence other than what Alexis said -- to the jury or to the other witnesses. Nor does Alexis' testimony provide an overwhelming case against Nicklous. She couldn't keep straight where or how many times this allegedly happened -- was it just the bathroom, or was there an incident in the bedroom? And how about the kitchen? Was there one there, too? And were there five times, or only one?

This was a weak case that depended on the credibility of a five year old child who could not even keep straight how many rooms in which this alleged abuse occurred -- a child who was subject to her mother's hostility toward Nicklous for going off with other women after he moved in with her. The State improperly bolstered Alexis' testimony by having a physician with no stated qualifications testify that her entire examination -- the relevant part of which consisted of a history obtained from Alexis -- was "consistent" with sexual abuse. In other words, the doctor believed what Alexis told her.

That may well be, but the State should not have been allowed to present this unfounded opinion to the jury, because the State did not establish Dr. Solomon's qualifications so as to provide a foundation for her testimony. Allowing it violated Nicklous' rights to due process of law and a fair trial before a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. This Court must reverse his conviction and remand for a new trial without this inadmissible opinion evidence.

CONCLUSION

For the reasons set forth in Points I and II, appellant Nicklous Churchill respectfully requests that this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b).

The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 8,313 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in September, 2002. According to that program, these disks are virus-free.

On the _____ day of September, 2002, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, 1530 Rax Court, 2nd Floor, Jefferson City, MO 65109.

Kent Denzel